IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

ASHLAND LLC, et al.,	)	
	)	
Plaintiffs/Counterclaim Defendants,	)	
	)	
v.	)	
	)	C.A. No.: N15C-10-176 EMD CCLD
THE SAMUEL J. HEYMAN 1981 CONTINUING TRUST FOR LAZARUS S. HEYMAN, et al.,	)	
	)	
Defendants/Counterclaim Plaintiffs.	)	

Submitted: December 3, 2019
Decided: February 25, 2020

Upon Plaintiffs/Counterclaim Defendants Ashland LLC, International Specialty Products Inc., ISP Environmental Services Inc. and ISP Chemco LLC's Motion for Partial Summary Judgment
GRANTED in part and DENIED in part

Upon Defendant/Counterclaim Plaintiffs The Samuel J. Heyman 1981 Continuing Trust for Lazarus S. Heyman, et al.'s Motion for Partial Summary Judgment
DENIED

Christopher Viceconte, Esquire, Gibbons P.C., Wilmington, Delaware, William S. Hatfield, Esquire, Camille V. Otero, Esquire, Jennifer A. Hradil, Esquire, and Joshua R. Elias, Esquire, Gibbons P.C., Newark, New Jersey, *Attorneys for Plaintiffs and Counterclaim Defendants.*

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DAVIS, J.

I. INTRODUCTION

This is a breach of contract case assigned to the Complex Commercial Litigation Division of this Court. The causes of action arise from environmental liability allocations under a Stock Purchase Agreement, dated May 30, 2011 (the "SPA"), and statutory law. Plaintiffs Ashland LLC, International Specialty Products, Inc. ("ISP"), ISP Environmental Services Inc. ("IES"), and ISP Chemco LLC ("Chemco")[1] filed a declaratory judgment and breach of contract case against the Heyman Defendants—The Heyman Seller Defendants, The Heyman Trust Defendants, and Linden Property Holdings LLC ("LPH").[2] The Heyman Defendants then answered and counterclaimed.

Ashland and the Heyman Defendants filed cross motions for partial summary judgment on August 2, 2019. The Court held a hearing on the motions on October 11, 2019. After the hearing, the Court took the matters under advisement. This is the Court's opinion on the motions. For the reasons set forth more fully below, Ashland's motion is **GRANTED** in part and **DENIED** in part and the Heyman Defendants' motion is **DENIED**. The Court finds that the SPA is not ambiguous and sets forth obligations that the Heyman Defendants failed to satisfy. The Court finds that issues remain with respect to material facts concerning all other claims except those relating to unjust enrichment, and that a trial will resolve those issues.

[1] Plaintiffs collectively will be called Ashland unless specificity is required. Plaintiff Chemco is a subsidiary of Plaintiff ISP. Plaintiff IES is a subsidiary of Plaintiff Chemco.

[2] The Court is using the definitions used by the parties in various pleadings and motions. The Court will use the term "Heyman Defendants" collectively unless specificity is required—*i.e.*, LPH or alike.

II. RELEVANT FACTS

The property involved in this civil action is located at 4000 Road to Grasselli, Linden, New Jersey (the "Linden Property").[3] The Linden Property has a chemical manufacturing history. From 1919 to 1991, non-parties GAF Corporation and GAF Chemicals Corporation ("GAF Chemicals") owned and operated the Linden Property.[4] GAF Corporation and GAF Chemicals discovered contamination at the Linden Property during the 1970s-80s.[5] The Heyman Defendants had owned GAF Corporation and GAF Chemicals since the 1980s.[6]

A. BACKGROUND

In June 1989, the New Jersey Department of Environmental Protection ("NJDEP") and ISP's predecessor, GAF Chemicals, entered into an Administrative Consent Order ("ACO").[7] The ACO covered both on-site and off-site remedial obligations at the Linden Property. Under the ACO, NJDEP required GAF Chemicals "to design and implement" a remedy for "any and all pollution at the site, emanating from the site, or which has emanated from the site."[8]

Manufacturing operations ended at the Linden Property in 1991.[9] Later that year, ISP's subsidiary, IES, became the owner of the Linden Property and assumed all liabilities for its remediation.[10] Upon that transfer, NJDEP provided a determination to ISP that the Environmental Cleanup Responsibility Act ("ECRA"), the predecessor statute to the Industrial Site Recovery Act ("ISRA"), did not apply to the 1991 transaction. NJDEP provided this

[3] Pls.' 2d Am. Compl. ¶ 32.
[4] *Id.* ¶ 33.
[5] *Id.* ¶ 34.
[6] *Id.* ¶ 35.
[7] Heyman Defs.' Mot. App. at HA1676; Ashland Mot. Transmittal Aff. Ex. 10.
[8] Heyman Defs.' Mot. App. at HA1682; *see also* Ashland Mot. Transmittal Aff. Ex. 10.
[9] Heyman Defs.' Mot. App. at HA3294.
[10] *Id.* at HA1598-1601. In 2006, the NJDEP amended the ACO to acknowledge that "[IES] has assumed responsibility for the 1989 ACO." *Id.* at HA1668.

determination because there was no transaction covered by the ECRA—"specifically a corporate reorganization not substantially affecting the ownership of the Industrial Establishment."[11]

Up and until Ashland acquired ISP, IES worked with NJDEP to perform its remedial obligations. In 1993, NJDEP identified the two "operable units" at the Linden Property for which they were seeking remediation under the ACO: soil and groundwater.[12] IES submitted a draft Remedial Action Workplan (the "RAWP") to NJDEP for soil and groundwater in May 2002.[13] IES revised the RAWP in October 2002, and the NJDEP later approved "the site wide remedial actions proposed in the [revised] RAWP" in April 2003.[14]

After IES completed its on-site remedial work, in August 2005 and July 2011, the NJDEP issued No Further Action letters (the "NFAs") for on-site soil and groundwater.[15] The NFAs included covenants not to sue for on-site contamination at the Linden Property.[16] According to David McNichol, ISP's remediation manager for the Linden Property who went to Ashland upon the sale, the groundwater NFA was conditional, but receipt of the soil NFA meant that IES was "done with the soil remediation on the Linden site."[17]

NJDEP also pursued ISP for off-site liabilities at the Linden Property. In September 2005, NJDEP requested that ISP complete a supplemental off-site investigation followed by an ecological risk assessment ("ERA")[18] for off-site contamination pursuant to the ACO.[19] ISP

[11] *Id.* at HA2905.
[12] *Id.* at HA1646.
[13] *Id.* at HA0695.
[14] *Id.* at HA0682, HA0691; *see also id.* at HA4028-29.
[15] *Id.* at HA0960, HA1198.
[16] *Id.*
[17] *Id.* at HA3524, HA3530-31; *see also id.* at HA3482.
[18] An ERA is an evaluation of the risk posed by site-related contaminants to natural resources considering contaminant levels and likely pathways to those resources. *See* N.J.A.C. § 7:26E-1.16.
[19] Heyman Defs.' Mot. App. at HA0009.

conducted the off-site investigation and the first step of the ERA, but did not complete the remaining steps because it requested clarification and a meeting with the NJDEP.[20]

On May 3, 2006, NJDEP, IES and Chemco amended the ACO.[21] The amended ACO confirms that IES has assumed responsibility for the ACO.[22] In addition, the amended ACO provides that Chemco is a guarantor for IES solely with respect to matters addressed in the amendment.[23]

In June 2007, NJDEP filed a complaint against ISP (the "NJDEP Complaint").[24] Through the NJDEP Complaint, NJDEP asserted remedial and natural resource damages ("NRD") claims related to the Arthur Kill and Piles Creek waterways in connection with the Linden Property.[25] NJDEP also reiterated that an ERA was necessary.[26]

In June 2011, two months before the Closing,[27] ISP entered into a Consent Judgment (the "Consent Judgment") with the NJDEP in which the Piles Creek claims were dismissed with prejudice, but "claims associated with the Arthur Kill Waterway" were expressly preserved and "dismissed without prejudice."[28] The Consent Judgment stated that it did not affect the operation of the ACO as the ACO was "outside of the scope" of the Consent Judgment, except as it related to Piles Creek.[29] Both the NJDEP Complaint and Consent Judgment noted that an ERA was necessary under the ACO.[30] At Closing, while the on-site obligations under the ACO were

[20] *Id.* at HA0002.
[21] Heyman Defs.' Mot. App. at HA1668-72; Ashland Mot. Transmittal Aff. Ex. 38 (59:20-61:6).
[22] Heyman Defs.' Mot. App. at HA1668-72.
[23] *Id.*
[24] Heyman Defs.' Mot. App. at HA1744, HA1756, HA1759-60. The NJDEP sent ISP another letter the month after it filed the NJDEP Complaint, in July 2007, in which it restated the same positions it had taken in the 2005 letter and the NJDEP Complaint. *Id.* at HA2895.
[25] *Id.* at HA1744; HA1756; HA1759-60.
[26] *Id.*
[27] "Closing" has the meaning ascribed to it in the SPA.
[28] *Id.* at HA0977, HA0992-93.
[29] *Id.* at HA0979.
[30] *Id.* at HA0980-81, HA1756.

concluded by the soil and groundwater NFAs, the Heyman Defendants contend that off-site remediation of the Linden Property under the ACO remained an open and unresolved issue.[31]

In August 2011, Ashland acquired ISP, IES, and Chemco from the Heyman Defendants for approximately $3.2 billion.[32] This acquisition was done through the SPA.[33] Under the SPA, the Heyman Defendants would retain the Linden Property. On August 23, 2011, immediately after the SPA closed, IES conveyed the Linden Property back to LPH for one dollar.[34] Defendant LPH presently owns the Linden Property.[35]

B. ASHLAND'S DUE DILIGENCE

With the assistance of its environmental consultant, EHS Support LLC ("EHS"), Ashland conducted environmental due diligence in connection with a potential acquisition.[36] On March 23, 2011, Ashland sent the Heyman Defendants an initial request for environmental documents, including cleanup orders and "[n]otices of potential liability received from governments or other parties."[37] In early April 2011, the Heyman Defendants created a data room disclosing limited documents including, with respect to the Linden Property, "the ACO, NFAs, the NJDEP Complaint, and Consent Judgment."[38]

The ACO required an investigation and remediation of contamination "at the site, emanating from the site, or which had emanated from the site."[39] However, the data room did not include the letters sent by the NJDEP in 2005 and 2007 directing the Heyman Defendants to

[31] *Id.* at HA3334, HA3430-31, HA3454, HA3699-3700; *see also id.* at HA1144. Ashland disputes Heyman Defendants' contention that off-site remediation under the ACO remained an open issue. Ashland Answering Br. at 6.
[32] 2d Am. Compl. ¶ 51.
[33] *Id.* ¶¶ 2, 51-52.
[34] *Id.* ¶ 60.
[35] *Id.* ¶ 58.
[36] *Id.* at HA0663; Ashland Answering Br. Transmittal Aff. Ex. 81 (49:11-50:10).
[37] Ashland Answering Br. Transmittal Aff. Exs. 99-100.
[38] Heyman Defs.' Mot. Br. at 10.
[39] Ashland Mot. Transmittal Aff. Ex. 10; Heyman Defs.' Mot. App. at HA1682.

investigate and remediate off-site contamination in the Arthur Kill under the ACO.[40] On April 7, 2011, the Heyman Defendants made no mention of any outstanding off-site obligations under the ACO in response to Ashland's written questions regarding the environmental condition and remediation status of various properties, including the Linden Property.[41] Ashland's questionnaire also specifically inquired: "[w]hich sites have known or suspected off-site contamination?"[42] The Heyman Defendants' response directed Ashland to "See Data Room."[43] One of the data room documents related to the Linden Property was a draft Consent Judgment expected to resolve the NJDEP Complaint.[44] The Consent Judgment stated, "[b]ased on the [2005] Baseline Ecological Evaluation, IES concluded that an ecological risk assessment for the IES Site was not necessary . . . ."[45] EHS reports in April and May of 2011 summarized the ACO, noted that "[w]astes were disposed of both on- and off-site,"[46] and addressed the proposed Consent Judgment, recognizing that it releases claims for Piles Creek, but "carves out any NRD for Arthur Kill."[47]

The Heyman Defendants also provided a summary identifying the components of ISP's $10,558,000 environmental reserve for the Linden Property (in thousands) as:

Linden O&M[48] Discounted (20 Years)	$7,308
NRDA Onsite	3,000
Eco Risk Assessment	250[49]

[40] Ashland Answering Br. Transmittal Aff. Ex. 26 (114:25-115:9); Heyman Defs.' Mot. App. at HA0007-9.
[41] Ashland Answering Br. Transmittal Aff. Ex. 101.
[42] *Id.* at Ex. 101 (Project Lion – Environmental Diligence Questions Part 2 (D)(1)(b)(iv)).
[43] *Id.*; *see also id.* at Ex. 4 (75:11-77:16).
[44] Ashland Answering Br. Transmittal Aff. Ex. 102, at 3 ¶ H.
[45] *Id.* at 4 ¶ L.
[46] Heyman Defs.' Mot. App. at HA0452.
[47] *Id.* at HA0453, HA0552, HA0671.
[48] "O&M" refers to operations and maintenance of the remedy.
[49] Ashland Answering Br. Transmittal Aff. Ex. 101.

Ashland contends that the Heyman Defendants did not represent any part of the reserve to be for any off-site remediation under the ACO.[50] Ashland sent the Heyman Defendants follow-up questions on April 13, 2011, inquiring as to the Linden Property about the NFA letter and remediation.[51] The Heyman Defendants' internal draft response confirmed that NFA letters would complete investigation and remediation, and that the Linden Property reserve would not be "zero[ed]-out" because "the reserve will stay as it represents the ongoing O&M costs."[52] The Heyman Defendants conveyed this information to Ashland on a conference call, advising that a remedy was in place and reserves were for 20 years of O&M of completed remedial measures.[53] Ashland claims that "this information led Ashland to believe that there were no outstanding off-site obligations under the ACO as the parties were negotiating the SPA."[54]

C. NEGOTIATIONS

In February 2011, Ashland made a $3.3 billion offer for the stock of ISP and other entities.[55] In early May 2011, during due diligence, Ashland revised the offer to $2.75 billion.[56] The Heyman Defendants rejected Ashland's revised offer.[57]

On Monday, May 23, 2011, Ashland's CEO, Jim O'Brien, and representatives for the Heyman Defendants, David Winter and David Millstone, met and reached agreement on the key terms of a deal, which provided that the Heyman Defendants would retain the Linden Property

[50] As of October 2010, Heyman Defendants had reallocated $2 million in reserves for off-site liabilities related to the Linden Property to a separate Newark Bay reserve. Ashland was unaware of this at the time. Ashland Answering Br. at 5; Ashland Answering Br. Transmittal Aff. Exs. 110-12.
[51] Ashland Answering Br. Transmittal Aff. Ex. 100.
[52] *Id.* at Ex. 108 (Project Lion – Environmental Diligence Questions Part 3 (B)(2)(b)(ii)).
[53] *Id.* at Exs. 75 (243:2-15), 109; *see also* Heyman Defs.' Mot. App. at HA0453.
[54] Ashland Answering Br. at 6. Ashland alleges that none of the cited testimony supports the Heyman Defendants' contention that Ashland's witnesses acknowledged that "off-site remediation . . . under the ACO remained an open issue." Heyman Defs.' Mot. Br. at 9.
[55] Heyman Defs.' Mot. App. at HA1278; Ashland Mot. Transmittal Aff. Exs. 57, 58.
[56] Heyman Defs.' Mot. App. at HA3393; Ashland Mot. Transmittal Aff. Ex. 55.
[57] Ashland Mot. Transmittal Aff. Ex. 63; *see also id.* at Exs. 1 (44:2-49:9), 61 (299:8-302:17).

and the Wayne Property and the "economics and liabilities of sites."[58] Aside from these facts, Ashland disputes the Heyman Defendants' account of this meeting.[59] In particular, Ashland disputes that the parties "agreed 'specifically'" that the Heyman Defendants would only retain liabilities on the site or that there was a discussion about off-site remediation being incomplete, which would be a significant liability.[60] At the time of the meeting, the record seems to indicate that the representatives of the parties did not know the remediation status of the Linden Property, nor were they familiar with the ACO.[61] Ashland was not in the real estate development business and had no knowledge of the liabilities associated with the Linden and Wayne Properties, so Mr. O'Brien suggested that the Heyman Defendants "keep those properties with all the liabilities" and reduce the purchase price by $100 million.[62]

D. DRAFTING THE SPA

On May 30, 2011, the parties convened at the offices of Cravath, Swaine & Moore ("Cravath"), Ashland's deal counsel, to finalize the SPA.[63] The Heyman Defendants and their deal counsel, Sullivan & Cromwell ("S&C"), drafted Section 3.15 of the Seller Disclosure Schedule, entitled "Environmental Matters," identifying the existing environmental liabilities, including for the Linden Property.[64] The Heyman Defendants' May 26th draft stated that the Linden Property "is the subject of environmental liabilities" and that "[t]here can be no assurance concerning the ultimate costs for these liabilities," while incorporating by reference certain data room documents.[65] The final Seller Disclosure Schedule states that the Linden Property is the

[58] *Id.* at Exs. 1 (58:24-59:12, 68:11-69:24), 3, 55 (194:24-199:23, 304:17-305:25), 60 (65:13-16, 73:6-74:20).
[59] Ashland Answering Br. at 7.
[60] *Id.*; Heyman Defs.' Mot. Br. at 12.
[61] Ashland Mot. Transmittal Aff. Exs. 1 (65:15-67:22, 92:14-18, 94:6-96:8), 60 (82:21-85:12).
[62] *Id.* at Ex. 55 (197:13-199:19).
[63] *Id.* at Exs. 1 (77:7-78:2), 55 (226:6-19).
[64] Ashland Answering Br. at 9; *see also* Ashland Answering Br. Transmittal Aff. Ex. 113.
[65] Ashland Answering Br. Transmittal Aff. Ex. 113, at 55.

"subject of environmental liabilities related to discharges of hazardous materials into the environment" and discussed only the on-site issues relating to the ACO and Consent Judgment, but it makes no reference to outstanding off-site obligations.[66]

The SPA establishes the parties' obligations regarding the Linden Property. SPA Section 2(e) to Schedule 5.19 of the SPA states:

> In connection with the Linden Transfer, the Seller Parties shall assume all Liabilities to the extent related to or arising from or existing at the Linden Property, including Liabilities arising under or relating to (i) Environmental Laws, provided that such Liabilities shall not include any off-site migration or disposal of Hazardous Materials from the Linden Property prior to the Closing, any claims or damages associated with any off-site migration or disposal of Hazardous Material from the Linden Property prior to the Closing, and for the avoidance of doubt, any off-site contamination of soils, groundwater or sediments, any third party superfund sites including the Newark Bay Complex, any natural resources damages or exposure claims relating to operations or discharges prior to Closing, (ii) the Linden Contracts, (iii) any personal property located at the Linden Property, (iv) the Linden Litigation, or (v) the Linden Transfer (including any Liabilities to the extent arising by virtue of the delivery of a limited warranty deed, but excluding any Liabilities arising out of or relating to fraudulent conveyance or similar liability), in each case, other than as set forth in the proviso in clause (i) above, whether arising before, on or after the Closing Date (the "Linden Excluded Liabilities").[67]

On SPA Section 2(f) also discusses the Linden Property transaction—specifically the "Linden Transfer"[68]—and states:

> In connection with the Linden Transfer, the Seller Parties shall be responsible, at their sole cost and expense, for compliance, if applicable, with any requirements of the Industrial Site Recovery Act ("ISRA") and, if ISRA applies to the Linden Transfer, Seller Parties shall (i) within five (5) Business Days after execution of this Agreement, make any required filings or notifications (such as a General Information Notice, as defined under ISRA) to the New Jersey Department

[66] Ashland Mot. Transmittal Aff. Ex. 6, at 56.

[67] Heyman Defs.' Mot. App. at HA3069; Ashland Mot. Transmittal Aff. Ex. 5. On August 19, 2011, Ashland and the Heyman Defendants subsequently amended SPA Sections 2(a) and 2(e) (the "August Amendment"). SPA Section 2(e) now begins: "In connection with the Linden Transfer, the Seller Parties shall assume all Liabilities to the extent related to or arising from or existing at the Linden *Subsidiary (subject to no assets other than the Linden Excluded Assets being transferred to the Linden Subsidiary by Buyer or any of its Affiliates after the Closing) or the Linden* Property…." (emphasis added). The August Amendment does not make any changes to SPA Section 2(f). *See* Ashland Mot. Transmittal Aff. Ex. 54.

[68] The "Linden Transfer" is defined in SPA Section 2(a). *See* Heyman Defs.' Mot. App. at HA3067-68; Ashland Mot. Transmittal Aff. Ex. 5;, at 12-13.

> of Environmental Protection ("NJDEP"), and (ii) use reasonable best efforts to, prior to closing, make all other filings, undertake all other measures, including where required undertaking any site investigation or Remedial Action required by ISRA. In addition, the Seller Parties shall use reasonable best efforts to amend any consent decree or other binding agreement with any Governmental Entity relating to the Linden Excluded Liabilities, and to replace or substitute any related financial assurance (including any bond or letter of credit), to include the name of the Linden Transferee following the Linden Transfer and, if permitted by NJDEP, to remove the name of ISP or any of the Companies therefrom.[69]

The Heyman Defendants claim to have disclosed the liabilities relating to Arthur Kill in Section 3.15 of the Seller Disclosure Schedule, which they provided pursuant to the SPA.[70] Section 3.15.5(b), which is a specific disclosure of NRDs, does not mention remedial obligations under the ACO.[71] Section 3.15.6 discloses liability regarding a specific litigation and ISP's potential liability as a potentially responsible party in the "Newark Bay Complex Superfund Site."[72] The Newark Bay Complex Superfund Site does not involve the Linden Property ACO.[73]

Ashland contends that the Seller Disclosure Schedule implies that there are no outstanding off-site obligations under the ACO.[74] The Heyman Defendants claim that internal emails and drafts of provisions suggest that the Heyman Defendants intended to only accept the on-site liabilities, but not the off-site liabilities associated with the Linden Property under the ACO.[75] The record indicates that language involving the ACO obligations had not been provided by the Heyman Defendants to Ashland prior to the final drafting of the SPA.[76]

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[69] Heyman Defs.' Mot. App. at HA3069; Ashland Mot. Transmittal Aff. Ex. 5, at 14.
[70] Heyman Defs.' Mot. Br. at 19; *see* Heyman Defs.' Mot. App. at HA3075, HA3136-37.
[71] *See* Heyman Defs.' Mot. App. at HA3136-37; *see also* Ashland Answering Br. Transmittal Aff. Ex. 113, at 55.
[72] Heyman Defs.' Br. at 19-20; Heyman Defs.' Mot. App. at HA3137; Ashland Answering Br. Transmittal Aff. Ex. 113, at 55; *see also* Ashland Answering Br. Transmittal Aff. Ex. 137, at 20-21.
[73] *Id.*
[74] Ashland Answering Br. at 12; *see* Ashland Answering Br. Transmittal Aff. Ex. 137, at 21-22.
[75] *See* Heyman Defs.' Mot. App. at HA1790; *see also* Ashland Answering Br. Transmittal Aff. Exs. 117 (65:11-67:8), 118.
[76] *See* Ashland Answering Br. Terraciano Aff. ¶ 4.

E. POST-SPA SIGNING CONDUCT

The Heyman Defendants believed ISRA did not apply to the Linden Transfer and, therefore, have done nothing to comply with ISRA.[77] The Heyman Defendants arranged for their outside environmental counsel, Dennis Toft, to prepare a memorandum ("ISRA Memorandum"), intended to be provided to Ashland, to demonstrate that ISRA did not apply to the SPA transaction.[78] In the ISRA Memorandum, Mr. Toft stated that (1) the transfer of stock of ISP, as the indirect owner of an "industrial establishment," did not trigger ISRA because ISP's assets were not available for remediation of the Linden Property, and (2) the Linden Property was not an "industrial establishment" within the meaning of ISRA.[79]

However, in granting an ECRA exemption in 1991, it appears that the NJDEP relied upon ISP's representation that ISP's assets were available to remediate the Linden Property following a reorganization.[80] Ashland also alleges that the NJDEP did not approve a "site-wide" Remedial Action Workplan ("RAWP"), which was the sole basis for Toft's conclusion that the Linden Property was no longer an industrial establishment under ISRA.[81]

Under SPA Section 2(b), the parties jointly retained Colliers to provide a fair market value appraisal of the Linden Property.[82] At the time, the Heyman Defendants claimed that it would be "a waste of time and money" for Colliers to evaluate the environmental liabilities because these had already been addressed by many law firms and consultants.[83] However, the record seems to provide that the Heyman Defendants were internally concerned that Colliers'

[77] Heyman Defs.' Mot. App. Ex. 26 (287:10-16).
[78] *See* Ashland Answering Br. Transmittal Aff. Ex. 119.
[79] Heyman Defs.' Mot. App. at HA1409-12.
[80] *See* Ashland Answering Br. Transmittal Aff. Exs. 120, 121, 136, at 13.
[81] Ashland Answering Br. at 16; s*ee* Heyman Defs.' Mot. App. at HA1411-12; *see also* Heyman Defs.' Mot. App. at HA0691-882.
[82] Ashland Mot. Transmittal Aff. Ex. 5 at 13.
[83] Heyman Defs.' Mot. App. at HA1271-72.

appraisal might "uncover more liabilities."[84] Colliers' appraisal ultimately proceeded on the assumption that all remediation was essentially complete at the Linden Property.[85]

At Closing, the parties executed the Contribution Agreement transferring the Linden Property from IES to Sellers' designated transferee, LPH.[86] In Section 2 of the Contribution Agreement, LPH agreed to undertake the "Assumed Liabilities," which were defined nearly identical to the Linden Excluded Liabilities in SPA Section 2(e).[87] The Contribution Agreement is the only document signed by the actual transferee of the Linden Property, LPH.[88]

Ashland then began taking additional steps to evaluate the off-site liabilities at the Linden Property that it would acquire at Closing. EHS sent Ashland a memorandum summarizing the likelihood of off-site impacts at the Linden Property as high due to disposal on-site and off-site, with some discharges to the Arthur Kill.[89] The memorandum also noted that the off-site ERA referenced in the NJDEP Complaint "d[id] not appear to have been completed," and recognized that the NJDEP could bring a "new case . . . for the remainder of the claims" not subject to the Consent Judgment.[90] Ashland also began setting environmental reserves for off-site obligations. Peter Ganz, who Ashland hired as its general counsel in July 2011, was in-house counsel for ISP from 1995 to 2005 and personally negotiated with the NJDEP on ISP's behalf about the Linden Property.[91] On August 4, 2011, Mr. Ganz requested a meeting with GAF Chemicals and ISP personnel to assist in determining "reserves for the ISP environmental sites by [Ashland's] fiscal year end."[92] Mr. Ganz attached a spreadsheet listing ISP environmental liabilities that Ashland

[84] Ashland Answering Br. Transmittal Aff. Ex. 122.
[85] *Id.* at Ex. 124, at LIN0015382.
[86] Heyman Defs.' Mot. App. at HA0950.
[87] *Id.* at HA0951; *see also* Ashland Mot. Transmittal Aff. Ex. 5, at 14.
[88] *See* Heyman Defs.' Mot. App. at HA0955-56.
[89] *Id.* at HA0657-59.
[90] *Id.* at HA0658-59.
[91] Heyman Defs.' Mot. Br. at 21; *see also* Heyman Defs.' Mot. App. at HA1547, HA1550, HA1659.
[92] Heyman Defs.' Mot. App. at HA1143.

had assumed, including a section for "Linden (Offsite)."[93] In the spreadsheet, Ashland identified the ACO and Consent Judgment as "[r]egulatory driver[s]" for "Linden (Offsite)."[94]

As required in SPA Section 2(f), on August 5, 2011, the Heyman Defendants replaced the "financial assurance" required by the ACO[95] with a $7,744,000 letter of credit issued on behalf of LPH.[96] According to Ashland, the Heyman Defendants also arranged for the release of ISP's RFS,[97] and paid annual surcharges, totaling $309,760, from 2011 through 2014.[98] Furthermore, the NJDEP emphasized its understanding that the letter of credit covered all remediation requirements under the ACO, including remedial obligations in the Arthur Kill.[99] LPH's letter of credit remained in place in its full amount of $7,744,000 until 2015.[100]

Shortly after Closing, Ashland representatives met with certain ISP employees and learned that ISP's pre-Closing Linden Property reserve had three components: (1) on-site liability (2) a risk assessment for Piles Creek, and (3) the Consent Judgment.[101] Based upon this information, Ashland set post-Closing reserves for Piles Creek[102] and NRD,[103] but zeroed out the

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[93] *Id.* at HA1144.
[94] *Id.*
[95] In 1989, the NJDEP used the term "financial assurance" to describe the guarantee required for ongoing cleanups, but the regulations were later revised to reflect two types of financial guarantees: "remediation funding source" ("RFS") for ongoing cleanups, N.J.A.C. §§ 7:26C-2.3(a)5, -5.2(a)2.iii, and "financial assurance" for the performance of long-term monitoring, maintenance and inspection of an engineering control under the terms of a remedial action permit. *Id.* at § 7:26C-7.10(a)2. Thus, the "financial assurance" referenced in the ACO, and Section 2(f), is now referred to as an RFS. *See* Ashland Mot. Transmittal Aff. Ex. 42.
[96] *See* Ashland Mot. Transmittal Aff. Exs. 39, 42.
[97] *Id.* at Exs. 39, 43, 78-79.
[98] Ashland Answering Br. at 18; *see* Ashland Mot. Transmittal Aff. Exs. 17 (126:16-129:24), 19-20, 27. The NJDEP regulations would suggest the payments were for outstanding remediation rather than O&M. *See* N.J.A.C. §§ 7:26C-5.2(a), -5.2(c), -5.2(e) (distinguishing remediation funding sources required for remediation from financial assurance required for engineering controls); *id.* at § 7:26C-5.9 (providing for annual surcharges on remediation funding sources and that surcharge "is not applicable to the financial assurance established for a remedial action permit"); *id.* at § 7:26C-7.10 (requiring "financial assurance" for engineering controls and remedial action permits).
[99] Ashland Mot. Transmittal Aff. Ex. 42; *see also id.* at Ex. 38 (194:13-21).
[100] *Id*. at Ex. 47; *see also id.* at Ex. 44.
[101] Heyman Defs.' Mot. App. at HA0565; Ashland Mot. Transmittal Aff. Exs. 84-85; *see also* Ashland Mot. Transmittal Aff. Ex. 82 (293:12-294:11).
[102] Ashland Mot. Transmittal Aff. Ex. 82 (287:20-289:7, 296:7-297:21, 302:4-14, 313:4-316:7); *see id.* at Ex. 84; *see also id.* at Exs. 35-36, 81 (163:3-15).
[103] *Id*. at Exs. 82 (97:22-98:5, 151:13-23), 84, 86.

O&M related to compliance with the ACO, for which Ashland believed were the Sellers' responsibility.[104] It was not until after LPH's January 2014 letter to the NJDEP that Ashland retained a licensed site remediation professional ("LSRP"), requested an extension of the deadline, set a reserve, established any RFS, or performed any investigation or analyses required under the ACO.[105] Ashland did not set an environmental reserve for any off-site investigation or cleanup required in the Arthur Kill under the ACO until 2015, after the dispute with the Heyman Defendants arose.[106]

The Heyman Defendants sought to terminate the ACO subsequent to the Closing.[107] The Heyman Defendants contacted NJDEP and requested written notice that LPH had completed all obligations under the ACO.[108] In July 2012, the Heyman Defendants learned, through e-mail exchanges, that NJDEP would not terminate the ACO because of the outstanding off-site obligations.[109] The Heyman Defendants did not advise Ashland of these communications.[110] Ashland claims that, prior to this civil action, the Heyman Defendants never advised Ashland

[104] *Id.* at Exs. 82 (237:19-238:1), 84; *see also id.* at Exs. 35-36; Ashland Answering Br. Transmittal Aff. Ex. 131.
[105] Ashland Mot. Hoffman Aff. ¶¶ 5-12. Ashland's December 2011 radar screen refers to "off-site liability [that] came with the acquisition," but does not reference the ACO. Heyman Defs.' Mot. App. at HA2932. In contrast, the March 2015 radar screen notes that "Law/Remediation [is] reviewing to determine if Ashland is responsible for completing the ACO . . . required off-site investigation." Ashland Mot. Hoffman Aff. Ex. F; *see also* Ashland Mot. Hoffman Aff. ¶ 9 (confirming that potential liability for remediation in the Arthur Kill required under the ACO first appeared in the March 2015 Radar Screen). David McNichol, who managed ISP's Linden Property remediation prior to the Closing and thereafter worked for Ashland until January 2013, could not recall any conversations about any ACO obligations while with Ashland, and his departure memorandum did not mention the ACO. Ashland Mot. Transmittal Aff. Ex. 71 (18:4-11, 28:13-29:16, 37:24-38:5, 245:12-252:9, 257:12-21, 301:13-302:12); Ashland Answering Br. Transmittal Aff. Ex. 129.
[106] Ashland Mot. Transmittal Aff. Exs. 76 (370:16-372:11), 81 (256:23-257:12, 260:24-261:12), 82 (239:22-243:10, 248:1-12), 85; Ashland Mot. Hoffman Aff. ¶ 11; Ashland Mot. Hoffman Aff. Ex. J.
[107] Ashland Mot. Transmittal Aff. Exs. 9 (279:1-23), 13-15, 17 (163:19-164:3), 23.
[108] *Id*.
[109] *See id.* at Exs. 24, 29, 91; *see also id.* at Ex. 26 (366:23-367:12) (stating there was no formal legal document closing the liabilities in the Arthur Kill). NJDEP did not send the official letter rejecting Heyman Defendants' request to terminate the ACO until December 23, 2013. Ashland Mot. Hoffman Aff. Ex. A.
[110] Ashland Mot. Transmittal Aff. Exs. 9 (149:11-17), 26 (367:13-368:12).

that Ashland was required to address any outstanding issues under the ACO, post an RFS, or deal in any way with NJDEP in connection with the ACO.[111]

In December 2013, NJDEP declined LPH's termination request because "the scope of the ACO includes discharges off-site to Piles Creek and the Arthur Kill."[112] Additionally, NJDEP stated that even though the Consent Judgment "provided relief from liability" for Piles Creek, it did not "relieve any of the parties of the obligation to remediate discharges to the Arthur Kill."[113] On January 21, 2014, LPH responded—seemingly for the first time—by asserting that, under the SPA, "IES retained all off-site liabilities associated with the Linden Property."[114] LPH also claimed that the off-site ecological risk assessment required by NJDEP "pertains to an off-site liability and is therefore an IES obligation and responsibility and not an LPH responsibility."[115]

While LPH initially established an RFS under the ACO with a 2011 letter of credit, LPH later notified NJDEP of its intent to terminate that letter of credit and, ultimately, posted a smaller amount.[116] IES then had to establish its own letter of credit to cover the shortfall left by LPH to avoid severe penalties threatened by NJDEP.[117] LPH has terminated its smaller letter of credit.[118] On February 18, 2014, Ashland wrote to LPH that it would not take responsibility for the Linden Property off-site liabilities.[119]

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[111] *Id*. at Exs. 4 (244:25-245:23), 9 (149:11-17), 17 (158:13-159:14), 26 (367:13-22). While Mr. McNichol was copied on some internal e-mails regarding the Heyman Defendants' interest in terminating the ACO, Ashland Mot. Transmittal Aff. Exs. 73-74, 87-88, he states that he was unaware of the July 2, 2012 letter to NJDEP or the July 19, 2012 internal NJDEP e-mail thread noting NJDEP's position that the ACO would not be terminated. Ashland Answering Br. Transmittal Aff. Ex. 71 (229:6-10, 230:12-21, 240:6-11, 244:6-12); *see also* Ashland Mot. Transmittal Aff. Exs. 88-97.
[112] Heyman Defs.' Mot. App. at HA0944; Ashland Mot. Hoffman Aff. Ex. A, at 2.
[113] Heyman Defs.' Mot. App. at HA0944; Ashland Mot. Hoffman Aff. Ex. A, at 2.
[114] Ashland Mot. Transmittal Aff. Ex. 27.
[115] *Id.* at Exs. 17 (157:9-158:24), 27.
[116] *Id.* at Exs. 39, 44, 46-47.
[117] *Id.* at Exs. 40 (232:12-233:18), 51-52.
[118] Ashland Answering Br. Transmittal Aff. Ex. 132.
[119] Heyman Defs.' Mot. App. at HA0048-50.

F. PROCEDURAL POSTURE

Ashland commenced this action on October 20, 2015. Ashland filed its First Amended Complaint on December 3, 2015. Ashland initially asserted five causes of action relating to purported obligations of the Heyman Defendants in connection with Schedule 5.19 of the SPA and purported responsibility for the investigation, remediation, and cleanup costs regarding environmental contamination of the Arthur Kill, an off-site location. On January 6, 2016, the Heyman Defendants filed their Answer to the Complaint and Counterclaims. Through the Counterclaims, the Heyman Defendants plead six causes of action related to the same off-site liabilities associated with the Linden Property.

On October 26, 2017, Ashland filed its Second Amended Complaint. The Second Amended Complaint seeks: (1) declaratory judgment for breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) fraud; (4) unjust enrichment against the Heyman Defendants; (5) cost recovery and contribution under the Spill Act; and (6) unjust enrichment against LPH.

On August 2, 2019, both Ashland and the Heyman Defendants filed motions for partial summary judgment. Ashland filed its motion on Count I and Counterclaims II and III.[120] The Heyman Defendants filed their Motions on Counts I, II, III, IV and VI,[121] as well as on Counterclaims II and III. On August 30, 2019, both parties filed their Answering Briefs to the motions. On September 16, 2019, both parties filed their Reply Briefs. The Court held a hearing on the motions on October 11, 2019.

[120] These counts, essentially, seek relief concerning SPA Sections 2(e) and 2(f) regarding on-site and/or off-site remediation responsibilities either under the ACO or otherwise.
[121] Counts II, III, IV and VI assert claims for breach of the implied covenant of good faith and fair dealing, fraud, unjust enrichment and unjust enrichment respectively.

Ashland concedes that if the Court grants summary judgment in favor of Ashland on Count I, then the unjust enrichment claims (Counts IV and VI)—which are plead in the alternative—are moot.

III. PARTIES' CONTENTIONS

A. THE HEYMAN DEFENDANTS' CONTENTIONS

The Heyman Defendants are moving for summary judgment on the breach of contract claim and counterclaims, which are Count I and Counterclaims II and III. The Heyman Defendants argue that the SPA unambiguously allocates all of the Linden off-site liabilities, including those under the ACO, to Ashland. The SPA's text, structure, and purpose show that the Linden off-site liabilities were allocated to Ashland. Additionally, the Heyman Defendants assert that SPA Section 2(f) does not impose off-site liability on the Heyman Defendants and that Heyman Defendants complied with SPA Section 2(f).

In the alternative, the Heyman Defendants contend that the undisputed extrinsic evidence resolves any ambiguity in the SPA in the Heyman Defendants' favor. The Heyman Defendants argue that the drafting history and course of performance by the parties show the parties' understanding and intent to allocate the Linden off-site liabilities, including ACO-related liabilities, to Ashland. The Heyman Defendants alternatively assert that they are entitled to summary judgment under the Forthright Negotiator Doctrine.

The Heyman Defendants further claim that Ashland cannot establish any ISRA-related breach of contract because ISRA did not apply to the Linden Property transfer. Additionally, the Heyman Defendants argue that any ISRA obligations terminated at Closing and that the ISRA claim is time-barred.

The Heyman Defendants are also moving for summary judgment on Ashland's fraud claim, Count III, contending that the claim fails because Ashland did not rely on any false representation or omission. The Heyman Defendants further argue that Ashland's fraud claim is duplicative of the breach of contract claim.

The Heyman Defendants claim that Ashland's implied covenant claim, Count II, and unjust enrichment claims, Counts IV and VI, also fail. The Heyman Defendants contend that Ashland's non-fraud claims are precluded by the SPA's Exclusive Remedies Provision. The Heyman Defendants argue that Ashland concedes that the breach of contract claims are barred, that Ashland has no right to indemnification, and that the SPA expressly precludes Ashland's proposed declaration.

B. ASHLAND'S CONTENTIONS

Ashland is moving for summary judgment on the breach of contract claim and counterclaims, which are Count I and Counterclaims II and III. Ashland contends that the SPA unambiguously allocates responsibility for compliance with the ACO and ISRA to the Heyman Defendants. Ashland argues that SPA Sections 2(e) and 2(f) unambiguously allocate the ACO to the Heyman Defendants and that Ashland's interpretation is consistent with the remaining provisions of Schedule 5.19. Furthermore, Ashland claims that the SPA obligated the Heyman Defendants to comply with ISRA, which is an obligation that survived the Closing.

Ashland contends that if the Court finds any ambiguity in the SPA's allocation of liability for the ACO, the Heyman Defendants' Motion must be denied. Ashland argues that the drafting history, both parties' performance, and the business context of the SPA are consistent with the understanding that the Heyman Defendants were responsible for the entire ACO. Ashland further argues that the Heyman Defendants' internal communications are irrelevant regarding the

allocation of liability. Ashland also contends that the Heyman Defendants breached the SPA by failing to take any efforts to add LPH to the ACO and to request that IES be removed from the ACO.

Ashland argues against summary judgment on the fraud claim, saying that it should be denied because Ashland had no knowledge of outstanding off-site obligations under the ACO and that the fraud claim is not duplicative of the contract claim. Ashland additionally contends that the non-fraud claims are not precluded by the SPA's exclusive remedy provision. Finally, Ashland claims that the implied covenant of good faith and fair dealing claim survives summary judgment.

IV. STANDARD OF REVIEW

The standard of review on a motion for summary judgment is well-settled. The Court's principal function when considering a motion for summary judgment is to examine the record to determine whether genuine issues of material fact exist, "but not to decide such issues."[122] Summary judgment will be granted if, after viewing the record in a light most favorable to a nonmoving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.[123] If, however, the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record, then summary judgment will not be granted.[124] The moving party bears the initial burden of demonstrating that the undisputed facts support his claims or defenses.[125] If

[122] *Merrill v. Crothall-American Inc.*, 606 A.2d 96, 99-100 (Del. 1992) (internal citations omitted); *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. 1973).
[123] *Id.*
[124] *See Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962); *see also Cook v. City of Harrington*, 1990 WL 35244 at *3 (Del. Super. Feb. 22, 1990) (citing *Ebersole*, 180 A.2d at 467) ("Summary judgment will not be granted under any circumstances when the record indicates . . . that it is desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.").
[125] *See Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1970) (citing *Ebersole*, 180 A.2d at 470).

the motion is properly supported, then the burden shifts to the non-moving party to demonstrate that there are material issues of fact for the resolution by the ultimate fact-finder.[126]

Where the parties have filed cross motions for summary judgment and have not argued that there are genuine issues of material fact, "the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[127] Neither party's motion will be granted unless no genuine issue of material fact exists and one of the parties is entitled to judgment as a matter of law.[128]

V. DISCUSSION

A. THE COURT FINDS THAT ASHLAND IS ENTITLED TO SUMMARY JUDGMENT ON THE BREACH OF CONTRACT CLAIMS RELATING TO SPA SECTION 2(F)

Under Delaware law, the Court may interpret an unambiguous contract as a matter of law by giving clear and unambiguous terms their plain and ordinary meaning.[129] In interpreting a contract, the Court "give[s] priority to the intention of the parties," beginning with the "four corners of the contract."[130] To uphold the parties' intentions and give effect to the contract in its entirety,[131] a court must construe the contract "so that all of its provisions may be read together and harmonized."[132] The meaning inferred from a particular provision "cannot control the meaning of the entire agreement where such inference runs counter to the agreement's overall scheme or plan."[133]

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[126] *See Brzoska v. Olsen*, 668 A.2d 1355, 1364 (Del. 1995).
[127] Super. Ct. Civ. R. 56(h).
[128] *E.I. DuPont de Nemours and Co. v. Medtronic Vascular, Inc.*, 2013 WL 261415, at *10 (Del. Super. Jan. 18, 2013).
[129] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010).
[130] *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009).
[131] *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985).
[132] *Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 1999 WL 33236239, at *4 (Del. Ch. Nov. 4, 1999).
[133] *E.I. du Pont*, 498 A.2d at 1113.

Delaware courts may "consult extrinsic evidence secondarily to confirm" that the contract language evidences the "shared intent of the parties" when they entered the contract.[134] Moreover, "[s]ituations exist[] where the court may 'consult undisputed background facts to place the contractual provision in its historical setting without violating' the principle that the court not consider extrinsic evidence when interpreting an unambiguous contract."[135]

Utilizing these accepted principles, the Court finds and holds that the SPA is not ambiguous.

The Court has previously addressed SPA Sections 2(e) and 2(f) in connection with motions for judgment on the pleadings.[136] Based on the presentation by the parties, the Court allowed the causes of action on the SPA to proceed. The Court specifically held:

> In fact, *at this stage of the proceedings*, the Court is not comfortable that there are not ambiguities in the SPA or in the way the parties to this civil action interpret the parties' responsibilities under the ACO.[137]

The Court went on to discuss the various arguments made by the parties, noting that the perceived ambiguities related to the Heyman Defendants' duties under SPA Section 2(f).[138] The Court felt the record was not developed enough to explain the perceived ambiguities but noted that the Heyman Defendants' argument only seemed plausible when reading SPA Section 2(f) in isolation.[139] The Court did not, in this earlier decision, make a finding that the SPA and the language contained in Schedule 5.19 is ambiguous.

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[134] *Fox v. Paine*, 2009 WL 147813, at *5 (Del. Ch. Jan. 22, 2009), *aff'd*, 981 A.2d 1172 (Del. 2009).
[135] *Id.* (quoting *Eagle Indus. Inc v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 n.7 (Del. 1997)); *see, e.g.*, *Wilm. Firefighters Ass'n, Local 1590 v. City of Wilm.*, 2002 WL 418032, at *7-9 (Del. Ch. Mar. 12, 2002) (considering which party's "interpretation makes commercial sense" in light of negotiation history).
[136] *Ashland LLC v. The Samuel J. Heyman 1981 Continuing Trust for Lazarus S. Heyman*, 2017 WL 1191099 (Del. Super. Mar. 29, 2017).
[137] *Id*., at *5.
[138] *Id*., at *6
[139] *Id*.

Now that the record has been developed, the Court is comfortable that Schedule 5.19, including SPA Sections 2(e) and 2(f), is unambiguous and that the Heyman Defendants retained all liabilities relating to the Linden Property under the ACO. SPA Sections 2(e) and 2(f) when read in connection with the entire SPA and the conduct of the parties subsequent to the Closing confirm this.

When dealing with general and specific provisions of a contract, the more specific provision shall prevail.[140] Looking to SPA Sections 2(e) and 2(f), SPA Section 2(f) is the more specific provision. SPA Section 2(e) generally describes the liabilities of the parties and defines the Linden Excluded Liabilities. However, Section 2(f) details specific obligations of the Heyman Defendants to (i) be responsible for compliance with any applicable ISRA requirements, (ii) use reasonable best efforts to amend any consent decree or other binding agreement with any Governmental Entity relating to the Linden Excluded Liabilities to include LPH and, if permitted by NJDEP, to remove "ISP or any of the Companies," and (iii) replace or substitute any financial assurance (including any bond or letter of credit) related to any consent decree or other binding agreement with any Governmental Entity relating to the Linden Excluded Liabilities.

The Heyman Defendants believe SPA Section 2(e) carves out the off-site obligations under the ACO because of the general language pertaining to the exclusion of off-site liabilities. The Court finds that the Heyman Defendants' interpretation of SPA Section 2(e) is contradicted by the express and unambiguous language of SPA Section 2(f). The specific responsibilities and obligations that the Heyman Defendants undertook in Section 2(f) "qualifies the meaning" of

[140] *See TMIP Participants LLC v. DSW Grp. Hldgs. LLC*, 2016 WL 490257, at *12 (Del. Ch. Feb. 4, 2016).

Section 2(e)'s carve-out of the Heyman Defendants' broad assumption of liabilities, and, therefore, the scope of the Linden Excluded Liabilities.[141]

The Court cannot overlook the facts as they relate to SPA Section 2(f). NJDEP (a governmental entity) and ISP's predecessor, GAF Chemicals, entered into the ACO. As discussed above, the ACO is entitled Administrative Consent Order and thus qualifies as a consent decree or other binding agreement with a Governmental Entity. The ACO covers both on-site and off-site remedial obligations at the Linden Property. As such, the ACO is a consent decree or other binding agreement with a Governmental Entity relating to the Linden Excluded Liabilities. The Heyman Defendants, therefore, needed to expend reasonable best efforts to amend the ACO to include LPH and, if NJDEP agreed, remove ISP (or IES).[142] The record is devoid of any efforts by LPH or any other of the Heyman Defendants to include LPH on the ACO or remove IES from the ACO.

Instead of undertaking best efforts to add LPH or remove ISP or other related "Company," the Heyman Defendants instead sought to terminate the ACO subsequent to the Closing.[143] The Heyman Defendants contacted NJDEP and requested written notice that LPH had completed all obligations under the ACO.[144] In July 2012, the Heyman Defendants learned, through e-mail exchanges, that NJDEP would not terminate the ACO because of the outstanding off-site obligations.[145] Only then, did the Heyman Defendants begin to contend that Ashland

[141] *See DCV Hldgs., Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005).
[142] The ACO refers to ISP Environmental Services Inc. and ISP Chemco Inc.—entities affiliated with ISP.
[143] Ashland Mot. Transmittal Aff. Exs. 9 (279:1-23), 13-15, 17 (163:19-164:3), 23.
[144] *Id*.
[145] *See id.* at Exs. 24, 29, 91; *see also id.* at Ex. 26 (366:23-367:12) (stating there was no formal legal document closing the liabilities in the Arthur Kill). NJDEP did not send the official letter rejecting the Heyman Defendants' request to terminate the ACO until December 23, 2013. Ashland Mot. Hoffman Aff. Ex. A.

was solely responsible for the ACO. The record shows that that the Heyman Defendants failed to include or advise Ashland of these communications and developments.[146]

Next, the Heyman Defendants did replace "any financial assurance (including any bond or letter of credit)" required under the ACO and SPA Section 2(f). On August 5, 2011, the Heyman Defendants replaced the RFS, *i.e.*, "financial assurance," required by the ACO[147] with a $7,744,000 letter of credit issued on behalf of LPH.[148] The Heyman Defendants also arranged for the release of Chemco's original RFS,[149] and paid annual surcharges, totaling $309,760, from 2011 through 2014.[150] LPH's letter of credit remained in place in its full amount of $7,744,000 until 2015.[151] LPH later notified NJDEP of its intent to terminate that letter of credit and, ultimately, posted a smaller amount.[152] IES then had to establish its own letter of credit to cover the shortfall left by LPH to avoid severe penalties threatened by NJDEP.[153] LPH has terminated its smaller letter of credit.[154] Because LPH no longer is included on any financial assurances under the ACO, the Heyman Defendants have breached their contractual obligation under SPA Section 2(f)(ii).

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[146] Ashland Mot. Transmittal Aff. Exs. 9 (149:11-17), 26 (367:13-368:12).
[147] In 1989, NJDEP used the term "financial assurance" to describe the guarantee required for ongoing cleanups, but the regulations were later revised to reflect two types of financial guarantees: "remediation funding source" ("RFS") for ongoing cleanups, N.J.A.C. §§ 7:26C-2.3(a)5, -5.2(a)2.iii, and "financial assurance" for the performance of long-term monitoring, maintenance and inspection of an engineering control under the terms of a remedial action permit. *Id.* at § 7:26C-7.10(a)2. Thus, the "financial assurance" referenced in the ACO, and Section 2(f), is now referred to as an RFS. *See* Ashland Mot. Transmittal Aff. Ex. 42.
[148] *See* Ashland Mot. Transmittal Aff. Exs. 39, 42.
[149] *Id.* at Exs. 39, 43, 78-79. The ACO was amended in 2006 and provides that Chemco will provide the RFS.
[150] Ashland Answering Br. at 18; *see* Ashland Mot. Transmittal Aff. Exs. 17 (126:16-129:24), 19-20, 27. The NJDEP regulations would suggest the payments were for outstanding remediation rather than O&M. *See* N.J.A.C. §§ 7:26C-5.2(a), -5.2(c), -5.2(e) (distinguishing remediation funding sources required for remediation from financial assurance required for engineering controls); *id.* at § 7:26C-5.9 (providing for annual surcharges on remediation funding sources and that surcharge "is not applicable to the financial assurance established for a remedial action permit"); *id.* at § 7:26C-7.10 (requiring "financial assurance" for engineering controls and remedial action permits).
[151] Ashland Mot. Transmittal Aff. Ex. 47; *see also id.* at Ex. 44.
[152] *Id.* at Exs. 39, 44, 46-47.
[153] *Id.* at Exs. 40 (232:12-233:18), 51-52.
[154] Ashland Answering Br. Transmittal Aff. Ex. 132.

In addition, SPA Section 4(a) requires the Heyman Defendants to indemnify Ashland for losses related to the Linden Excluded Liabilities or from the Heyman Defendants' obligations under SPA Section 2(d). SPA Section 4 does not, however, provide that Ashland indemnify the Heyman Defendants for any losses related to the Linden Property. NJDEP is not bound by the terms of the SPA. NJDEP could, therefore, have gone against LPH's posted letter of credit of LPH as the owner of the Linden Property whether the liability was on-site or off-site. The Heyman Defendants, however, would be without a remedy against Ashland if NJDEP pursued such actions against LPH. This is contractually inconsistent with the idea that Ashland was responsible, even in part, under the ACO for actions taken by NJDEP under the ACO for on-site or off-site remediation.

No facts remain in dispute regarding the SPA Sections 2(e) and 2(f). The contract language itself controls the ACO portion of the dispute. Therefore, the Court partially grants summary judgment on Ashland's motion under Count I and Counterclaims II and III regarding the Heyman Defendants' breach of SPA Section 2(f).

B. THE COURT FINDS THAT GENUINE ISSUES OF MATERIAL FACT EXIST AS TO ALL OTHER CLAIMS RAISED IN THE MOTIONS.

1. ISRA Obligations

i. Applicability

SPA Section 2(f)'s ISRA provision required the Heyman Defendants to comply with ISRA, if applicable, "within five (5) Business Days after execution of this Agreement"[155]—months prior to Closing. The survival clause in Section 7.1 of the SPA provides that pre-Closing

[155] Heyman Defs.' Mot. App. at HA3069; Ashland Mot. Transmittal Aff. Ex. 5, at 14.

obligations "shall terminate at the Closing," unless a written claim for indemnification is made before.[156]

Here, material facts remain in dispute pertaining to whether the Linden Property remains an "industrial establishment" or whether ISRA applied to the transaction. The Heyman Defendants contend that the Linden Property is no longer an industrial establishment and, therefore, IRSA does not apply because NJDEP determined in 2018 that no industrial establishment remains on the property. Ashland contends that the Linden Property was an industrial establishment at the time of the 2011 transfer because the ECRA—the predecessor statute to ISRA—cleanup had begun on the property in 1990 and had not yet resulted in a site-wide RAWP.

These disputed facts regarding the applicability of ISRA means that the Heyman Defendants' breach of SPA Section 2(f)'s ISRA obligations remains at issue. Additionally, whether ISRA survived Closing is in dispute because Ashland contends that obligations to "use reasonable best efforts" and "undertake all other measures, including . . . any site investigation or Remedial Action"[157] cannot be performed entirely before Closing. The Heyman Defendants contend that ISRA applied only to pre-Closing filings.

ii. Statute of Limitations

Delaware has a three-year limitations period for contract claims.[158] The breach of contract claim as it relates to the ISRA obligations, if not barred on the merits or extinguished by the survival clause, accrued five days after the SPA's execution pursuant to Section 2(f), or, at

[156] Ashland Mot. Transmittal Aff. Ex. 2 at 87; *see, e.g., Eni Hldgs., LLC v. KBR Grp. Hldgs., LLC*, 2013 WL 6186326, at *7-9 (Del. Ch. Nov. 27, 2013) (enforcing survival clause).
[157] *See* Heyman Defs.' Mot. App. at HA3069; Ashland Mot. Transmittal Aff. Ex. 5 at 14; *see, e.g., Alliance Data Sys. Corp. v. Blackstone Capital Partners V L.P.*, 963 A.2d 746, 763 n.60 (Del. Ch. 2009) (distinguishing best efforts provision from absolute commitment).
[158] 10 *Del. C.* § 8106.

the very latest, at Closing.[159] The statute of limitations runs once a claimant is on inquiry notice, such that "facts surface that would lead a reasonably prudent person to discover the wrong."[160]

Material facts remain in dispute regarding when the breach occurred, or when Ashland should have known of any breach. The Heyman Defendants contend that Ashland should have known prior to the Closing of any possible breach because Ashland knew about the ACO. Ashland contends that it was unaware of any outstanding obligations under the ACO until December of 2013 when NJDEP rejected LPH's request to terminate the ACO.

Therefore, the Court partially denies summary judgment on Ashland's motion under Count I and Counterclaims II and III pertaining to ISRA obligations because material facts remain in dispute.

2. The Fraud Claim

To prevail on a fraud claim under Delaware law, a plaintiff must establish:

> (i) a false representation, usually of fact, made by the defendant; (ii) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth; (iii) an intent to induce the plaintiff to act or to refrain from acting; (iv) the plaintiff's action or inaction was taken in justifiable reliance upon the representation; and (v) damage to the plaintiff as a result of such reliance.[161]

In a contractual setting like the negotiation of an SPA, "a party has no affirmative duty to speak."[162] "An affirmative obligation to speak only arises where there is a fiduciary or other similar relation of trust and confidence between the parties."[163] An "essential element of [a

[159] *See VLIW Tech. v. Hewlett–Packard Co.*, 2005 WL 1089027, at *13 (Del. Ch. May 4, 2005); *see, e.g.*, *Pivotal Payments Direct Corp. v. Planet Payment, Inc.*, 2015 WL 11120934, at *4 (Del. Super. Jan. 4, 2015) ("The statute of limitations period starts to run at the time of the breach.").
[160] *AM Gen. Hldgs. LLC v. The Renco Grp., Inc.*, 2016 WL 4440476, at *13 (Del. Ch. Aug. 22, 2016).
[161] *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1208 (Del. 1993).
[162] *Prairie Capital III, L.P. v. Double E Hldg. Corp.*, 132 A.3d 35, 52 (Del. Ch. 2015).
[163] *Id.* (internal quotation omitted).

fraud] claim . . . is that the alleged victim not be aware of the true facts which are misrepresented."[164]

The statute of limitations begins to run when a party discovers facts "constituting the basis of the cause of action *or* the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery" of such facts.[165] The Court considers whether there were "'red flag[s]' that clearly and unmistakably would have led a prudent person of ordinary intelligence to inquire" and, if pursued, would have led to discovery of the elements of the claim.[166]

Material issues of fact remain in dispute surrounding the fraud claim. The Heyman Defendants contend that Ashland knew about the ACO obligations and did not rely upon any omissions or misrepresentations. Ashland contends that it was unaware of any outstanding obligations under the ACO and that the Heyman Defendants failed to respond to direct questions regarding any remediation of the Linden Property. Thus, Ashland contends it relied upon omissions and misrepresentations in the negotiations and was unaware of any potential liability Ashland may have pertaining to the Linden Property.

Additionally, the Heyman Defendants contend that Ashland's fraud and contract claims are duplicative. The fact that the value of each claim–in the absence of the other–may be the same, does not render the damages duplicative.[167] Ashland claims that it is entitled to full recovery of damages, including ones that are only recoverable under its fraud claim. As material

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[164] *Merrill v. Crothall Am., Inc*., 606 A.2d 96, 100 (Del. 1992).
[165] *Coleman v. Pricewaterhousecoopers, LLC*, 854 A.2d 838, 842 (Del. 2004) (quoting *Becker v. Hamada, Inc.*, 455 A.2d 353, 356 (Del. 1982)) (emphasis in original).
[166] *Id.* at 843.
[167] *See, e.g. Perrigo Co. v. Int'l Vitamin Co.*, 2019 WL 359991, at *1 (D. Del. Jan. 29, 2019) (finding that where a contract claim sought an amount of undisclosed liabilities and a fraud claim sought damages of the inflated price of the purchased business, damages were not duplicative even though both rested on the buyer's "dissatisfaction with paying too much for the transferred business" and sought recovery of "overpaid amounts").

facts relating to fraud remain in dispute, it is not appropriate for the Court to address at this time whether the damages sought are duplicative.[168]

The Court will deny summary judgment on the Heyman Defendants' motion under Count III. The Court does feel, however, that the factual record supporting the fraud claim here is not very strong. The parties are sophisticated and were well-represented throughout negotiations. Ashland needs to demonstrate that the Heyman Defendants knowingly made false representations with the intent to make Ashland act or not act. The Court has ruled that the parties addressed the ACO contractually in the SPA. The Court is skeptical that given these contractual efforts to contract with respect to the ACO that the Heyman Defendants deceived Ashland as set forth in Count III, or that Ashland justifiably relied on representations in this arms-length transaction.

3. The Implied Covenant of Good Faith Claim

The implied covenant of good faith and fair dealing, implied by law in every contract, "requires parties to a contract to refrain from arbitrary or unreasonable conduct which deprives a party from receiving the fruits of the bargain."[169] "The covenant is 'best understood as a way of implying terms in the agreement,' whether employed to analyze unanticipated developments or to fill gaps in the contract's provisions."[170] Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience."[171]

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[168] In addition, Ashland seems to seek different relief under Count I and II than in Count III—*e.g.*, declaratory versus money damages.
[169] *DecisivEdge, LLC v. VNU Grp., LLC*, 2018 WL 1448755, at *9-10 (Del. Super. Mar. 19, 2018) (internal quotations omitted); *see also Kelly v. McKesson HBOC, Inc.*, 2002 WL 88939, at *10 (Del. Super. Jan. 17, 2002).
[170] *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005) (quoting *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 443 (Del. 1996)).
[171] *Fleer Corp. v. Topps Chewing Gum, Inc.*, 539 A.2d 1060, 1062 (Del. 1988).

Material facts remain in dispute regarding the implied covenant of good faith and fair dealing claim. This claim relates to the breach of contract and fraud claims. The breach of contract claim regarding the ACO is clear; however, the ISRA obligations require factual determinations to be made based on facts in dispute. Ashland had to provide a letter of credit regarding the ACO liability when LPH reduced the amount. The Heyman Defendants failed to indemnify Ashland in reference to the ACO obligations for which the Heyman Defendants have responsibility. Whether Ashland was previously aware of the ACO or any potential liability is in dispute. These facts relate to the implied covenant of good faith claim.

Therefore, the Court denies summary judgment on the Heyman Defendants' Motion under Count II.

4. The Non-Fraud Claims and the SPA's Exclusive Remedies Provision

SPA Section 2(f) qualifies SPA Section 2(e)'s definition of Linden Excluded Liabilities to include certain off-site obligations under the ACO. As a result, Schedule 5.19, Section 4(a) entitles Ashland to indemnification for losses arising out of any compliance with the ACO. Furthermore, the general indemnification provision in Section 7.2 requires Sellers to indemnify Ashland for any losses arising out of "any breach of any covenant or agreement of the Seller Parties."[172] Additionally, Section 7.9 provides that, "[e]xcept in the case of fraud," Ashland is not entitled to extra-contractual relief and that "the remedies expressly provided in this Agreement shall constitute the sole and exclusive basis for and means of recourse between the parties."[173]

[172] Ashland Mot. Transmittal Aff. Ex. 2, at 87 (§ 7.2(b)).
[173] *Id.* at 94.

The Heyman Defendants contend that Ashland has no right to any indemnification claims.[174] Ashland contends that it has a right to indemnity as a remedy under the contract despite the fact its claims are not labeled as indemnification claims.[175] Material facts remain in dispute regarding indemnity because the applicability of ISRA and compliance with ISRA remain at issue, which would fall under the indemnification claim. Indemnification may apply to the remediation under the ACO and the removal of IES from the ACO; however, more facts pertaining to ISRA in relation to the ACO are needed before the Court can decide whether Ashland is entitled to indemnification for any breach of SPA Section 2(f) as it relates to ISRA.

Therefore, the Court denies summary judgment on the Heyman Defendants' motion as it relates to indemnification.

VI. CONCLUSION

For the reasons set forth above, the Court **GRANTS** in part Ashland's motion on the breach of contract claims relating to the ACO, and **DENIES** in part Ashland's motion on all other grounds. The Court **DENIES** Heyman Defendants' motion except that Counts IV and VI relating to unjust enrichment will not go forward.

The Court is not addressing any issues relating to damages, if any. As such, the decision here is not a final order on any claim. The Court will schedule a hearing to go over outstanding matters that need to be addressed prior to trial.

IT IS SO ORDERED.

/s/ Eric M. Davis
Eric M. Davis, Judge

[174] *See, e.g., JCM Innovation Corp. v. FL Acq. Hldgs., Inc.*, 2016 WL 5793192, at *6 (Del. Super. Sept. 30, 2016) (dismissing claims where exclusive remedy was indemnification).
[175] *See Eurofins Panlabs, Inc. v. Ricerca Biosciences, LLC*, 2014 WL 2457515, at *5 (Del. Ch. May 30, 2014) (refusing to dismiss contract claims that did not "invoke the word 'indemnification,'" notwithstanding the exclusive remedy provision).